STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of PORSCHE SHANTRELLE SINCLAIR, DEOINTE' JUAN PENNINGTON, KEARA LASHANDA HILL and CARL DESHAWN HILL, Minors.

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

KESHANDA BOGGESS,

Respondent-Appellant.

UNPUBLISHED
August 12, 2003

No. 242868
Wayne Circuit Court
Family Division
LC No. 99-381822

Before: Donofrio, P.J., and Bandstra and O'Connell, JJ.

PER CURIAM.

Respondent-appellant Keshanda Boggess (hereinafter "respondent") appeals as of right from an order terminating her parental rights to the minor children pursuant to MCL 712A.19b(3)(c)(i) and (g). We affirm.

I

Respondent first argues that the circuit court erred in finding the existence of a statutory ground warranting termination of her parental rights. This Court reviews for clear error a circuit court's decision that a statutory ground for termination has been proven by clear and convincing evidence. MCR 5.974(I)[1]; *In re Trejo*, 462 Mich 341, 356-357; 612 NW2d 407 (2000). The circuit court's findings of fact qualify as clearly erroneous when this Court's review of the record reveals some evidence to support the findings, but leaves this Court with the definite and firm conviction that the circuit court made a mistake. *In re Conley*, 216 Mich App 41, 42; 549 NW2d 353 (1996). Clear error does not exist unless a decision strikes the reviewing court as more than just maybe or probably wrong. *In re Trejo, supra* at 356.

[1] The court rules governing child protective proceedings were amended and recodified as part of new MCR subchapter 3.900, effective May 1, 2003. This opinion refers to the rules in effect at the time of the trial court's decision.

A

The first statutory basis for termination cited by the circuit court, § 19b(3)(c)(i), authorizes termination of parental rights when at least 182 days have elapsed since the issuance of the initial dispositional order, and "[t]he conditions that led to the adjudication continue to exist and there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the child's age." Although more than 182 days had elapsed since the circuit court issued its first dispositional order on December 28, 2000, the evidence did not clearly and convincingly establish that the conditions leading to the court's exercise of jurisdiction over the children continued to exist at the time of the termination hearing.

The conditions that led to the exercise of jurisdiction included respondent's decision on August 6, 1999, to leave her children for a period of time without adult supervision in the care of Porsche and the children's thirteen- or fourteen-year-old cousin, and the unacceptably crowded housing conditions in which the children resided. Consequently, respondent's treatment plan initially required that she complete parenting classes, acquire and maintain safe and suitable housing for the children, visit the children, and develop a safe and suitable day care plan for the children's return to her care. By the time the court entered its initial dispositional order, respondent had lost her job, and the court directed her on the record "to have your income employment in place."

Respondent successfully completed parenting classes in May 2000. Respondent exhibited little cooperation or success in obtaining appropriate housing through early 2001. However, by April 2001, respondent had obtained a two-bedroom apartment and maintained her rent payments through the time of the termination hearing. By the time of the continued termination hearing on February 4, 2002, respondent also had obtained beds for the children and other furniture, making the apartment, which also appeared clean and had a refrigerator full of food, a suitable home for the children, according to petitioner's caseworker, Eugenia Lucas. Respondent reportedly visited the children regularly on weekends and interacted with them appropriately. Respondent also had consistent full-time employment, which provided health and preventative dental insurance, at Allen Tools from September 5, 2001, through the time of the termination hearings. With respect to a prospective day care plan for the children while she worked, respondent indicated that her mother and her aunt, who lived in the same apartment building, were willing to assist her in caring for the children, and Lucas had interviewed respondent's mother and deemed her a suitable caregiver.

Because the evidence indicated that none of the conditions that led to the court's exercise of jurisdiction over the children continued to exist at the time of the termination hearings, we conclude that the circuit court clearly erred in ordering termination pursuant to § 19b(3)(c)(i).

B

The circuit court also relied on § 19b(3)(g) in support of its termination order. That subsection authorizes termination under the following circumstances:

> The parent, without regard to intent, fails to provide proper care or custody for the child and there is no reasonable expectation that the parent will be able to

> provide proper care and custody within a reasonable time considering the child's age.

Section 19b(3)(g) requires clear and convincing evidence of both a parent's failure and inability to provide proper care and custody. *In re Hulbert*, 186 Mich App 600, 601, 605; 465 NW2d 36 (1990).

Clear and convincing evidence established respondent's *failure* to provide the children with proper care and custody. The testimony of respondent and a protective services worker indicated that, in August 1999, respondent left the children for approximately one hour without adult supervision, and that she and the children resided in an overcrowded house where the four children slept on two mattresses laid on the floor. Testimony and court reports by Carol Lark, a Court Appointed Special Advocate (CASA) for the children, indicated that respondent had severely neglected the children's educational needs.

Although respondent made much laudable progress, the following indications of record substantiate respondent's *inability* to provide the children with proper care and custody. Over an extended period, respondent failed to cooperate or maintain contact with petitioner's caseworkers and CASA worker Lark. As alleged in the petition requesting termination of her parental rights, respondent failed to take advantage of an early caseworker's efforts to obtain a federal section eight housing voucher, or voucher extension, for respondent. Two of petitioner's court reports (dated August 30, 2000, and June 22, 2001) document respondent's unavailability on at least four occasions when the worker attempted to visit her residence to discuss her treatment plan, and that respondent had not contacted petitioner's workers. Although respondent once requested petitioner's assistance in obtaining furniture for her apartment, she acknowledged that she failed to attend two appointments with an assistance eligibility specialist in April and May 2001. The brief transcript of the December 11, 2000, dispositional hearing, which occurred between the dates of petitioner's reports, likewise reflects the circuits court's observation that the caseworker reported no "progress on treatment plan goals due to [respondent's] lack of cooperation." The two CASA reports, prepared on June 26, 2001, and April 23, 2002, and the testimony of Lark similarly describe that respondent (1) failed to respond to numerous mailed attempts to communicate with her, (2) met with Lark on only one occasion, June 10, 2001, (3) did not appear at a scheduled home visit, (4) never scheduled a home visit, and (5) never expressed to Lark any concerns or interest in the conditions of her children. Respondent recalled receiving only one or two letters from Lark, and that Lark had once attempted to visit her apartment when respondent was on her way to work, but respondent acknowledged that she made no attempt to reschedule the visit because she "was just busy" with work.

In accordance with the original psychological evaluation of respondent, the court at the close of the December 7, 2001, termination hearing ordered respondent to undergo a psychiatric evaluation to determine whether she might benefit from any medications, and to commence individual therapy. By the time of the continued hearing on February 4, 2002, however, respondent had not undergone or scheduled a psychiatric evaluation, and had not attended any therapy sessions, although several days before the hearing she allegedly scheduled an appointment for the next week. According to respondent, it had slipped her mind to make the appointment earlier. Respondent did not believe that counseling was necessary, but indicated that it might help her deal with her depression and sadness arising from the children's removal,

and expressed her willingness to attend counseling if it would help her regain custody of the children.[2]

The existing record does not reflect that respondent fully comprehended the extent of the care the children would require. According to Lark, who had contacted the children on a weekly basis since May 2001, the children had made some progress but remained "very fragile," as follows: (1) all of the children had educational issues, were behind "where they should adequately be educationally wise," and needed proper attention and supervision, "[e]specially attending school"; (2) Keara remained sometimes angry and despondent in school; (3) nine-year-old Carl could not recite the alphabet or his address or phone number and had low self-esteem; and (4) Deointe' required constant reassurance "that he is loved and cared for." Lucas agreed that the children required ongoing counseling and tutoring. Lark opined that, given the children's special needs, the severe past neglect of their educational needs, respondent's ongoing failure to communicate with her or express interest in the children, and the children's reports of "how often they saw [respondent] and what went on in the home," respondent could not properly care for the children.

Respondent testified that she felt able to handle all four children and their special needs, and was willing to ensure that they received tutoring and therapy, which they might need to address the trauma arising from their separation from respondent. However, when asked if she understood the extent of the children's special needs, respondent answered that Carl was "real behind" and a special education student, Deointe' was sometimes angry and "real hyper," and that all of the children, who did not do well in school, "just need a lot of attention." Respondent also acknowledged that she had known that Carl needed special education since he was in the first grade, but that she did not arrange to have him tested. Lucas opined that in light of respondent's recent cooperation and progress, she could ensure that the children obtained necessary counseling and tutoring, but conditioned her opinion on respondent's continued receipt of assistance by family members and petitioner or the CASA; Lucas hoped petitioner could offer respondent services for six more months.

---

[2] The record does not contain any updated reports or other documentation concerning respondent's attendance at counseling after the February 4, 2002, continued termination hearing. The only additional evidence considered by the court was the updated "CASA reports and attachments" that the court admitted at the very brief May 6, 2002, continuation of the termination hearing. On appeal, the attorney for the children has submitted an April 30, 2002, summary of respondent's counseling progress, which does not appear in the record provided to this Court. The report reflects that respondent commenced her therapy sessions on March 22, 2002, and had attended five sessions by April 30, her most recent session having been canceled by the therapist. According to the report, respondent consistently attended sessions, "progressed to social, engaging and proactive in her own therapy sessions," "accepted responsibility for her past parenting errors," was "working to increase self-awareness and except [sic] responsibility for her own life and actions," was "making steady progress towards the established goals," and had "matured a great deal since our initial session by accepting responsibility for her own actions and life." Assuming that this document is properly considered by this Court, while the report reflects some further noteworthy progress, no indication exists that respondent successfully completed her therapy or gained insight into the children's special needs.

Lastly, respondent also disregarded a visitation order of the circuit court. Respondent conceded that, after her cousin, with whom Porsche and Deointe' had resided since August 1999, was evicted from her residence in July 2001, she returned the children to respondent's care. Respondent acknowledged that, without court authorization, or in violation of a court order, she kept the children in her custody, in her unfurnished apartment, for two or three days without notifying petitioner of their whereabouts, explaining that she hoped to take the children to live with her mother instead of returning them to foster care.

In conclusion, respondent evidently loved the children, who undisputedly loved her. Respondent also made a lot of progress, including completing parenting classes, maintaining housing and employment, apparently visiting the children regularly, and attending all but one of the court hearings. Nonetheless, we are constrained to conclude that the evidence of respondent's severe educational neglect of the children while they resided in her custody, and her failures to participate in several aspects of her treatment plan during the nearly three-year period that the children were in foster care, clearly and convincingly demonstrated her inability to properly parent the children and the unlikelihood that she would have the ability to do so within a reasonable time given the children's ages. We cannot characterize the circuit court's decision as more than just maybe or probably wrong. *In re Trejo*, *supra* at 356.[3]

C

Although respondent does not specifically challenge the circuit court's determination concerning the best interests of the children, the appellate brief of the children contends that the termination order clearly was not in their best interests. MCL 712A.19b(5). Despite the undisputed existence of a bond between respondent and the children, we cannot conclude that the circuit court clearly erred in finding that termination served the children's best interests in light of the facts that (1) the children previously suffered severe educational neglect in respondent's care; (2) the children's current conditions and progress were "very fragile"; (3) respondent exhibited a consistent failure or unwillingness to cooperate or discuss the children with CASA worker Lark; (4) at the time the court ordered termination, the children already had spent approximately thirty-four months in foster care, and even Lucas acknowledged that respondent would need continued assistance from petitioner or the CASA to provide for the children's special needs. *In re Trejo*, *supra* at 356-357.

[3] The children argue on appeal that the instant case is controlled by *In re Newman*, 189 Mich App 61, 65-71; 472 NW2d 38 (1991), and *In re Moore*, 134 Mich App 586, 593-602; 351 NW2d 615 (1984), in which this Court reversed orders terminating parental rights, given the respondents' substantial compliance with their various treatment plan recommendations, and a lack of clear and convincing evidence of any statutory grounds warranting termination. However, the cases cited by the children are distinguishable because (1) the instant respondent exhibited a greater lack of cooperation with petitioner's offered services, casting doubt on her ability to provide the children with proper care and custody; and (2) unlike the cases cited by the children, in this case much evidence substantiated that respondent severely neglected the children's educational needs. Compare *In re Moore*, *supra* at 594 (finding the record wholly lacking in evidence that the respondent had neglected or abused her children at the time she initiated involvement with the petitioner).

II

Respondent next argues that the circuit court untimely issued its termination order according to MCR 5.974(G)(1). We initially note that respondent affirmatively expressed her agreement to one continuance of the termination hearing, and failed to object to a second continuance. See *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999) (observing that issues not raised before the trial court are unpreserved); *Farm Credit Serv's of Michigan's Heartland, PCA v Weldon*, 232 Mich App 662, 683-684; 591 NW2d 438 (1998) (explaining that a party waives an appellate claim of error to which he contributes by plan or negligence in the trial court). In any event, MCR 5.974(G)(1) imposes no explicit sanction for a court's failure to issue its termination order within seventy days of the commencement of the termination hearing, and respondent alleges absolutely no prejudice arising from the delay in this case, which afforded respondent additional opportunities to demonstrate further progress that would have weighed against a decision to terminate her parental rights. *In re TC*, 251 Mich App 368, 369-371; 650 NW2d 698 (2002), citing MCR 2.613(A).

III

Respondent further suggests that she did not knowingly, intelligently and voluntarily waive the circuit court's finding of probable cause to support the allegations of neglect within the initial petition for temporary custody of the children. Our review of the record reflects that respondent waived appellate review of this claim by affirmatively agreeing to the circuit court's finding that probable cause existed, and at no time thereafter challenging before the court the knowing or voluntary nature of her waiver. *People v Adams*, 245 Mich App 226, 239-240; 627 NW2d 623 (2001). We further note that respondent's argument on appeal depends entirely on a one-sentence statement by her counsel, the context of which plainly reflects that counsel's expression of respondent's intent to set the matter "for a probable cause," after waiving probable cause, constituted an inadvertent misstatement.

IV

We decline to review the merits of respondent's last assertion that the circuit court erred in refusing a request to sever the jurisdictional trials of respondent and her sister, which involved identical allegations of neglect. Although respondent's sister requested that the circuit court hold separate jurisdictional trials, respondent herself never did so. Accordingly, respondent forfeited this Court's review of her unpreserved claim of entitlement to separate jurisdictional trials, but for plain error affecting her substantial rights. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999); *People v Partee*, 130 Mich App 119, 124; 342 NW2d 903 (1983). Furthermore, respondent cites no authority for the proposition that the severance requirements and standards set forth within MCR 6.121 apply in the context of a child protective proceeding. *In re Hamlet (After Remand)*, 225 Mich App 505, 521; 571 NW2d 750 (1997) (explaining that a party may not merely announce a position and leave it to this Court to discover and rationalize the basis for the claim). Even assuming that respondent refers to the appropriate standard for severance in a child protection proceeding, she does not allege in her brief on appeal any facts tending to "clearly, affirmatively, and fully demonstrate[] that [her] substantial rights [were] prejudiced and that severance [wa]s the necessary means of rectifying the potential prejudice." *People v Hana*, 447 Mich 325, 346; 524 NW2d 682, amended on other grounds sub nom *People v Rode*, 447 Mich 1203 (1994), citing MCR 6.121(C). "The failure to make this showing in the trial court, absent

any significant indication on appeal that the requisite prejudice in fact occurred at trial, will preclude reversal of [the] joinder decision." *Hana, supra* at 346-347.[4]

Affirmed.

/s/ Pat M. Donofrio
/s/ Richard A. Bandstra
/s/ Peter D. O'Connell

[4] While suggesting neglect on the part of her attorney for failing to more vigorously assert respondent's entitlement to a separate jurisdictional trial, respondent fails to cite any law in support of her position. *In re Hamlet, supra* at 521. Moreover, in light of respondent's failure to set forth any facts demonstrating prejudice arising from counsel's alleged inaction, even a claim of ineffective assistance supported by appropriate authority would fail. *People v Rodgers*, 248 Mich App 702, 714-715; 645 NW2d 294 (2001).